In the

Supreme Court of the United States

No. 78-243

MARTIN THEATRES OF TEXAS, INC.,
Petitioner,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, JESSE JAMES, STATE TREASURER, AND JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

GOLDEN, POTTS, BOECKMAN & WILSON,
By: Geo. Garrison Potts,
By: Claude R. Wilson, Jr.,
By: H. David Herndon,
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Counsel for Petitioner.

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No. .....

MARTIN THEATRES OF TEXAS, INC.,
Petitioner,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS,
JESSE JAMES, STATE TREASURER, AND JOHN HILL,
ATTORNEY GENERAL OF THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Petitioner, Martin Theatres of Texas, Inc., prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas rendered in these proceedings on April 12, 1978.

OPINIONS BELOW

The decision of the Supreme Court of Texas appears at Appendix A. The Supreme Court of Texas refused petitioner's Application for Writ of Error because of no reversible error in the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin. The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin appears at Appendix B and is officially reported at 557 S.W. 2d 337.

JURISDICTION

The petitioner's Motion for Rehearing of the decision of the Supreme Court of the State of Texas was overruled on May 17, 1978. (See Appendix C) This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Petitioner brought suit against the Comptroller of Public Accounts of the State of Texas and others for a refund of sales taxes which it had paid under protest. The questions thereby arising are:

1. Whether the Texas Limited Sales and Use Tax violated the equal protection clause of the Fourteenth Amendment in taxing the leasing of motion picture films by petitioner while not taxing the leasing of the same item by other taxpayers merely because the occupations of the taxpayers were different.

2. Whether the imposition of the Texas Limited Sales and Use Tax upon petitioner violated the equal protection and due process clauses of the Fourteenth Amendment because such imposition severely penalized petitioner for its successful challenge of the constitutionality of the Texas admissions tax.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States,

Amendment XIV, § 1:

"* * * nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws."

Article 20.02, Taxation-General,

Vernons Annotated Texas Statutes:

"There is hereby imposed a limited sales tax at the rate of four percent (4%) on the receipts from the sale at retail of all taxable items within this state."

Article 20.04(Z), Taxation-General,

Vernons Annotated Texas Statutes (1971):

"There are exempted from the taxes imposed by this Chapter the receipts from the leasing or licensing of motion picture films of any kind to or by motion picture theatres which are subject to admission taxes as imposed by Chapter 21, Title 122A, Revised Civil Statutes of Texas, 1925, as amended, and to or by licensed television stations."

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are not in dispute.

Petitioner, Martin Theatres of Texas, Inc., owns theatres in the State of Texas in which it exhibits to its customers motion picture films which it leases from film distributors. Prior to 1975, petitioner, like all other motion picture theatre exhibitors in Texas, paid admission taxes, but paid no sales taxes on the transactions wherein they leased films from film distributors. In 1975, petitioner, like other theatre exhibitors in Texas, successfully challenged the Texas admissions tax as being unconstitutional. Thereafter, pursuant to Article 20.04(Z) Taxation-General, Vernons Annotated Texas Statutes, petitioner, like other theatre exhibitors in Texas, was compelled by the State of Texas to pay sales

taxes on the transactions whereby it leased from film distributors the films which it exhibited. However, also pursuant to said Article 20.04(Z), television stations were exempted from paying sales tax on the same transactions on which the motion picture exhibitors were being taxed, to wit: the leasing from film distributors of motion picture films for exhibition to the public. Petitioner's "film rental" sales taxes were paid under protest and petitioner brought this action to recover same. The trial of petitioner's suit for recovery of these "film rental" sales taxes is a "test" case (see Appendix B-2) for the similar suits by substantially all of the other motion picture theatre exhibitors in Texas, with approximately $12,000,000, of protested taxes at stake.

Petitioner's Second Amended Petition in the trial court alleged that,

> "Article 20.04(Z) of the Limited Sales, Excise and Use Tax Act violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States;"

and further that,

> "The enactment of an unconstitutional tax law subjecting the taxpayers who challenge the constitutionality thereof to the penalty of still another tax constitutes a denial of due process under the Fifth and Fourteenth Amendments to the Constitution of the United States * * *"

A non-jury trial in the 126th Judicial District Court of Travis County, Texas resulted in a judgment for petitioner that the Texas Sales and Use Tax "as applied to the leasing or licensing of motion picture films to motion picture theatres in Texas is unconstitutional and inapplicable," and awarded petitioner a refund of its taxes paid under protest.

The State appealed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin. The Court of Civil Appeals reversed the judgment of the trial court and rendered judgment that petitioner not recover the sales taxes it had paid under protest (Appendix D).

Petitioner appealed to the Supreme Court of the State of Texas by making Application for Writ of Error. Petitioner's Application in Point of Error 2C continued the challenge to constitutionality by asserting that

> "the imposition of such tax would constitute an unconstitutional penalty for the successful challenge to the validity of the admissions tax"

and in Point 2D by asserting

> "the 1971 Amendment exempted television stations and taxed theatres on the same transaction which is unconstitutional taxation for lack of equality and uniformity."

Petitioner's Application for Writ of Error was refused, no reversible error (Appendix A). Petitioner's Motion for Rehearing to the Supreme Court of the State of Texas was overruled on May 17, 1978 (Appendix C).

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with numerous decisions by this Court, for example *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 795 S. Ct. 437 (1959), that the equal protection clause of the Fourteenth Amendment requires classification for purposes of taxation to have a substantial basis and not be unreasonable, arbitrary or capricious.

After 1975, petitioner was required to pay sales tax on the transactions whereby they leased from film distributors

motion picture films which they showed to their customers. For the same years, television stations in Texas were exempted from sales taxes on identical transactions — leasing films from film distributors for exhibition to their viewers. The item involved in both situations is the same — a motion picture film. The transaction in both is the same — the lease of a motion picture film from film distributors. The use in both is the same — exhibition to the public for profit. The Texas sales tax is a transaction tax levied upon the transaction of leasing. *Young & Co. of Houston v. Calvert*, 405 S.W. 2d 174 (Tex. Civ. App. — Austin, 1969, writ ref'd).

It is patently unreasonable, arbitrary and capricious to impose sales tax on film rental transactions in the instance of the motion picture theatre exhibitor, but to exempt the television exhibitor. Assume that one man purchases a lawn mower which he subsequently uses to mow lawns on rent properties that he owns. Another man purchases an identical lawn mower which he subsequently uses in his business of mowing others' lawns for hire. In both instances, the item and transaction being taxed is the same — the retail purchase of a lawn mower; the use to which the property is being put is the same — mowing lawns for profit. The only difference between the two transactions is in the nature of the occupations of the respective purchasers. It is clearly unreasonable, arbitrary and capricious to tax one man's purchase of a lawn mower and not tax another's merely because of the difference in their occupations. It is similarly unreasonable and abritrary to exempt television stations from paying sales tax on their film rental transactions while taxing motion picture theatres on theirs.

2. The decision below directly conflicts with the equal protection and due process principals enunciated in

Cotting v. Godard, 183 U.S. 79, 46 L. Ed. 92; *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714.

In *Cotting*, this Court said

> "When the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalty imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

In the present case, a severe burden in the form of film rental sales tax was imposed upon petitioner because of petitioner's successful challenge of the constitutionality of the Texas admissions tax.

The imposition of sales tax on petitioner's film rentals was a burden because of the nature of the nationally standardized business arrangements between theatre owners such as petitioner and film distributors. Under the "take it or leave it" terms of the distributors' film rental contracts petitioner *was* able to reduce its film rental payments to distributors for the admissions taxes it paid. However, petitioner *was not* able to reduce its film rental by the sales taxes it paid. The net effect of this, as is shown by the following computation, is that under the sales tax, petitioner gets to keep less of each admission dollar than it did under the admissions tax, with more going to the film distributors.

This computation assumes a typical film rental arrangement wherein the film rental petitioner pays to the film distributor is seventy percent (70%) of the total petitioner

receives from its patrons for admission to the theatre and a $2.50 admission price.

Under Admissions Tax

Admission Price	$2.50	
Admission Tax	(.15)	= state's share
	2.35	
70% film rental	(1.65)	= distributor's share
	$ .70	= Petitioner's (exhibitor) share

Under Sales Tax

Admission Price	$2.50	
70% film rental	(1.75)	= distributor's share
	.75	
Sales tax (5% of film rental)	(.09)	= state's share
	$ .66	= Petitioner's (exhibitor) share

To impose the sales tax upon petitioner's film rental transactions in the event that, as actually happened, petitioner was not paying admissions tax because such had been successfully challenged, unconstitutionally penalized petitioner for making such successful challenge to the admissions tax.

This penalty was severe enough, especially on small town exhibitions, so that since the imposition of sales tax on film rentals 200 theatre screens have had to cease operations.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Texas in finding no reversible error in the opinion and judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

Respectfully submitted,

GOLDEN, POTTS, BOECKMAN & WILSON,

By: .....
Geo. Garrison Potts

By: .....
Claude R. Wilson, Jr.

By: .....
H. David Herndon

2300 Republic National
Bank Tower,
Dallas, Texas 75201,
(214) 742-8422,
Counsel for Petitioner.

August ...., 1978

PROOF OF SERVICE

I, H. David Herndon, a member of the firm of Golden, Potts, Boeckman & Wilson, attorneys of record for Martin Theatres of Texas, Inc., Petitioner herein, depose and say that on the ..... day of August, 1978, I served a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States on Respondent herein by mailing three (3) copies of same in a duly addressed envelope to Miss Martha E. Smiley, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, by United States Mail, Certified, Return Receipt Requested, with the correct postage affixed thereto.

H. David Herndon

SUBSCRIBED AND SWORN TO BEFORE ME at Dallas, Texas, this ..... day of August, 1978.

Notary Public in and for Dallas County, Texas

My Commission Expires:

CLERK'S OFFICE – SUPREME COURT

Austin, Texas

April 12, 1978

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of MARTIN THEATRES v. BULLOCK ET AL., No. B-7202

was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

**IN THE COURT OF CIVIL APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN**

No. 12,601

BOB BULLOCK, COMPTROLLER OF
PUBLIC ACCOUNTS, ET AL.,
Appellants,

v.

ABC INTERSTATE THEATRES, INC., ET AL.,
Appellees,

No. 12,621

BOB BULLOCK, COMPTROLLER OF
PUBLIC ACCOUNTS, ET AL.,
Appellants,

v.

MARTIN THEATRES OF TEXAS, INC.,
Appellee.

**FROM THE DISTRICT COURT OF TRAVIS COUNTY,
126TH JUDICIAL DISTRICT NOS. 250,485, AND
245,620B, HONORABLE JAMES R. MEYERS, JUDGE**

Appeals in two causes involving the same basic tax controversy have been consolidated in this Court for purposes of decision and disposition of the issues.

ABC Interstate Theatres, Inc., engaged in exhibiting motion picture films, brought the first lawsuit (No. 12,601)

in July of 1976 to recover taxes on leases of motion picture films, paid under protest to the Comptroller of Public Accounts, for tax periods in 1975 and 1976. In compliance with statute, Interstate sued as defendants the Comptroller, the State Treasurer, and the Attorney General of Texas. (V.A.T.S. Tax. — Gen. art. 1.05(2)).

Subsequently eight motion picture distributor companies intervened, intervenors being Allied Artists Pictures Corp., Avco Embassy Pictures Corp., Columbia Pictures Industries, Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Distributing Corporation.

The second appeal (No. 12,621) is from judgment in a suit filed in March of 1976 by more than 100 theater owners and operators, from which Martin Theatres of Texas, Inc. was severed and proceeded to judgment. Martin Theatres sought recovery of taxes paid under protest in tax periods of 1976 and 1977.

Each of the causes was tried before the district court without a jury, and the court entered judgments in both cases in January of 1977. In both cases the trial court found that the "sales and use tax as applied to the leasing or licensing of motion picture films to motion picture theatres in Texas is unconstitutional and inapplicable." The court awarded Interstate recovery of taxes in the sum of $463,748.53, and awarded Martin Theatres recovery of $53,637.54. From each of these judgments the State has appealed and brings the single point of error that the trial court erred as a matter of law in holding the tax unconstitutional and inapplicable.

To bring the facts of this litigation into proper perspective, we review the statutory changes, the court decisions,

and the rulings of the Comptroller which bear directly upon the tax levied by the State on the leasing of motion picture film to be exhibited. The Texas Limited Sales, Excise and Use Tax (Title 122A, Taxation-General, Chapter 20) includes as a taxable transaction the leasing of motion picture film, a "tangible personal property." (Arts. 20.01 (J) (1) (c) and 20.03).

Article 20.01 (J) (1) (c) as enacted in 1961 provided that a "Retailer" included:

> "Every person who leases or rents to another tangible personal property for storage, use or other consumption, *except that persons engaged in the leasing or licensing of motion picture films of any kind or character to motion picture theatres, television stations* and others *shall be liable for the tax levied under the provisions of this law,* and they *shall not pass said tax along to the person or persons to whom they lease or license said motion picture films.*" (Acts 1961, 57th Leg., 2nd C.S., Ch. 24, p. 71, 74). (Emphasis added).

Thus it is clear that in the renting, leasing, or licensing of motion picture films the distributor as lessor became responsible for the tax and was prohibited from passing on to, or collecting from, the exhibitor as lessee the amount of the tax. In interpreting application of the tax in such lease transactions the Comptroller issued Rule No. 11:

> "Persons leasing or renting motion pictures of any kind or character to motion picture theatres, television stations, etc., shall be considered the ultimate consumer of such motion pictures. They are thus liable for the tax based upon the purchase or lease price to them, and shall not pass such tax on to persons to whom they lease or rent the motion pictures."

Subsequently, in 1969, the Legislature amended Article 20.01 (J) (1) (c) to provide only that "Retailer" include:

> "Every person who leases or rents to another tangible personal property for storage, use or other consumption." (Acts 1969, 61st Leg., 2nd C.S., Ch. 1, p. 61, 64).

All prior reference to rental of motion picture films was deleted by this amendatory Act, and exemption from the tax was provided for "motion picture theatres which are subject to admission taxes" by adding Article 20.04(Z):

> "There are *exempted from the taxes imposed* by this Chapter the receipts from the leasing or licensing of motion picture films of any kind to or by *motion picture theatres which are subject to admission taxes* as imposed by Chapter 21, Title 122A, Revised Civil Statutes of Texas, 1925, as amended." (Acts 1969, 61st Leg., 2nd C.S., Ch. 1, p. 61, 79). (Emphasis added).

The following year, in 1970, American International Television, Inc., engaged in leasing to television stations motion picture films, brought suit for refund of taxes paid under protest challenging validity of the statute as discriminatory because of the exemption afforded motion picture theaters under Article 20.04(Z). The cause reached this Court for decision announced early in 1973. (Calvert v. American International Television, Inc., 491 S.W. 2d 455, no writ). This Court held that the classification by the Legislature and imposition of different burdens on theaters and television stations was not discriminatory and unequal since there existed a real difference which justified separate treatment. (491 S.W. 2d 458-9).

Prior to decision on the issues raised in that lawsuit, the Legislature in 1971 amended Article 20.04(Z) to include "licensed television stations" in an unqualified exemption from the tax, but without changing the condition that motion picture theaters be exempt "which are subject to admission taxes." The article as revised is quoted:

> "There are exempted from the taxes imposed by this Chapter the receipts from the leasing or licensing of motion picture films of any kind *to or by motion picture theatres which are subject to admission taxes* as imposed by Chapter 21, Title 122A, Revised Civil Statutes of Texas, 1925, as amended, *and to or by licensed television stations.*" (Acts 1971, 62nd Leg., Ch. 1, p. 1). (Emphasis added).

In a suit brought by ABC Interstate Theatres, Inc., against the Comptroller and other state officers, a district court in Travis County in a judgment entered October 4, 1975, held unconstitutional the admission tax imposed on motion picture theaters under Article 21.02(2), as amended effective September 1, 1975. (Acts 1975, 64th Leg., Ch. 719, p. 2304, 2307-8). No appeal was perfected, and judgment of the district court became final.

Thereafter, effective October 27, 1975, the Comptroller issued a ruling directive of administration of the sales and use tax on rental or lease of motion picture films to or by theaters. The ruling provided:

> "The admissions tax as applied to motion picture theaters has been declared unconstitutional; therefore, the Sales and Use Tax applies to the rental, lease and licensing of motion picture films of any kind to or by theaters, measured by the total amount charged for the use of the films. This provision is retroactive.
>
> "The leasing or licensing of motion picture films of any kind to or by licensed television stations is exempt from the Sales and Use Tax."

The ruling of the Comptroller resulted in collection of the tax from motion picture theaters. The motion picture the-

ater exhibitors in this lawsuit urge that the tax is discriminatory and therefore unconstitutional because the tax on film rentals is imposed on one industry but not upon another, both of which industries rent and use motion picture films. The same contention was made by American International Television in the cause before this Court in 1973. (491 S.W. 2d 458).

Since the commencement of the present litigation, and after the causes were submitted and orally argued before this Court, the Legislature amended Article 20.04(Z) to accord unqualified exemption to both "motion picture theatres" and "licensed television stations." The article, as it became effective June 10, 1977, now provides:

> "There are exempted from the taxes imposed by this Chapter the receipts from the leasing or licensing of motion picture films of any kind to or by motion picture theatres and to or by licensed television stations." (Acts 1977, 65th Leg., Ch. 380, p. 1035).

Because the bill by which the amendment was affected passed both houses of the Legislature by "overwhelming vote," counsel for appellees suggest that passage by such vote" * * * evidences our position that the Sales Tax on film rentals was never intended by the Legislature in the first instance."

Nothing in the amendatory Act suggests that the last Legislature, by passing the bill with strong majorities, proposed thereby to evidence a want of prior intention not to tax film rentals. Legislative intent in the original enactment of a statute is not drawn from the size of the majority by which a subsequent Legislature amends or repeals the statute. What the Legislature intended originally is to be found in the language of the statute itself. Simmons

v. Arnim, 110 Tex. 309, 220 S.W. 66 (1920); McGuire v. City of Dallas, 141 Tex. 170, 170 S.W. 2d 722 (1943).

As enacted in 1971, Article 20.04(Z) "exempted from the taxes imposed * * * motion picture theatres *which are subject to admission taxes* * * *" and extended to "licensed television stations" an unqualified exemption. After October 4, 1975, when a court held that the admission tax on theatres was unconstitutional, no theater "was subject to admission taxes," and with the statutory qualification rendered void, all theaters of this state thereafter became subject to the tax on film rentals.

Article 20.04(Z), as added to the tax statutes in 1969 and as amended in 1971, plainly provided that motion picture theaters "subject to admission taxes" would be exempted from tax on film rentals, the clear meaning being that theaters which are *not* subject to admission taxes would be required to pay the tax on film rentals.

After the district court in 1975 declared theaters no longer were required to pay admissions taxes, the condition for their exemption under Article 20.04(Z) from payment of the tax on film rentals was removed and their exemption became inoperative. Only licensed television stations remained exempt under terms of the statute. The motion picture exhibitors now contend, as already noted, that no reasonable difference between television stations and theaters exists, and theaters should not be required, for the tax periods involved in this suit, to pay film rental taxes, and that theaters having paid the tax under protest are entitled to refunds.

We have examined with care the decision of this Court in Calvert v. American International Television, Inc., *supra*, in which we found substantial and significant differences

between television stations and motion picture theaters in deciding whether a reasonable basis existed for classification of the two industries in separate categories for tax purposes. The only changes we note since that decision in 1973 are that theaters no longer pay admissions taxes, and this time the theaters are claiming discrimination, whereas in the earlier case discrimination was claimed by the television industry.

In *Calvert v. American International* we pointed out, "The two occupations are not the same, even though both the theater and the television station show motion picture films, the former as its sole occupation, the latter incidental to its principal business of news medium and exhibitor of commercial and other kinds of advertising." (491 S.W. 2d 459).

The rule is firmly established that the Legislature, in determining classifications for purposes of taxation, has broad powers, and courts will interfere only when there is a clear showing that there is no reasonable basis for an attempted classification. Hurt v. Cooper, 130 Tex. 433, 110 S.W. 2d 896 (1937); American Transfer and Storage Company v. Bullock, 525 S.W. 2d 918, 924 (Tex. Civ. App. Austin 1975, writ, ref'd).

In determining whether a classification is constitutional, the test to be applied by the court is whether the classification made by the Legislature is essentially arbitrary, unreasonable, and not based upon reality. Dallas Gas Co. v. State, 261 S.W. 1063 (Tex. Civ. App. Austin 1924, writ ref'd); American Transfer and Storage Company v. Bullock, *supra*. The courts will not strike down the tax statute where there is a real difference to justify the separate treatment adopted by the Legislature. Texas Co. v. Stephens, 100 Tex.

628, 103 S.W. 481 (1907); Dancetown, U.S.A., Inc. v. State, 439 S.W. 2d 333 (Tex. Sup. 1969); Calvert v. American International Television, Inc., *supra*.

Contentions by appellees that the tax violates requirements of due process, or of equality and uniformity, guaranteed under the Constitutions of the United States and of Texas, are overruled as contrary to the principles relied on, discussed, and cited in American Transfer and Storage Company v. Bullock (525 S.W. 2d 918, 925-6).

Under its single point of error the State contends on appeal (1) that it is not unconstitutional for the Legislature to exempt television stations and not exempt theaters from the tax on motion picture film rentals; (2) that it is not unconstitutional for the exhibitor to be liable for payment of the tax and the distributor to be liable for collection of the tax; (3) that the sales tax is applicable to film rentals as a tax on rental of tangible personal property; (4) that the correct tax base is cost of rental to the lessee; and (5) that receipts from rental of motion picture films to theaters have not been totally exempted from sales tax.

We have sustained the State's first contention in holding that the classification arrived at by the Legislature will not be declared void in the absence of showing that the classification is essentially arbitrary, unreasonable, and not based upon reality.

The remaining contentions by the State are in reply to the position taken by appellees on matters not controlling of the main issue of constitutionality. On the basis that such contentions by appellees may be regarded in the nature of counterpoints we should dispose of, we now consider them briefly and will overrule all such contentions.

The argument that it is fatal to validity of the tax statute for exhibitors to be liable for payment of the tax

and distributors to be liable for its collection of the tax is without merit. Under the statute in 1961 distributors were prohibited from passing the tax to the exhibitors under provisions of Article 20.01 (J) (1) (c). Film distributors were the only class of vendors or lessors required to absorb the tax. In 1969 this provision, which in 1961 placed the incidence of the tax on the distributor as lessor instead of the exhibitor as lessee, was deleted from the tax Act. With this change the tax was imposed on the lessee who occupies the place of the purchaser under Article 20.021 applicable to all vendors and lessors.

It is contended that the caption of the 1969 legislation was not sufficient, and in violation of Article 3, section 35, of the Constitution of Texas, because notice was not given of intent to transfer liability for payment of the tax or to increase the base for the tax. It is settled that the caption of an amendatory Act is not required by the Constitution to set out exactly what changes are made in the amending legislation if the subject of the Act is not remote from the subject of the original Act. Smith v. Davis, 426 S.W. 2d 827, 833 (Tex. Sup. 1968). See also Majestic Industries, Inc. v. St. Clair, 537 S.W. 2d 297, 301 (Tex. Civ. App. Austin 1976, writ ref'd n.r.e.). The caption of an amendatory bill need not apprise the reader of the precise effects of the body of the proposed Act if the caption discloses the general subject, Smith v. Davis, *supra*.

Contention is made also that the rental price of films includes two separate charges, those being (1) the price to rent the intangible film and (2) a charge for the intangible right to exhibit the film. Appellees argue that the sales tax should apply only to the price to rent the film as based on its replacement cost.

Under the Texas statute no attempt is made to tax an intangible. The Texas sales tax imposed on leases constitutes a transaction tax. Young & Company v. Calvert, 405 S.W. 2d 174, 176 (Tex. Civ. App. Austin 1966, writ ref'd), cert. denied 386 U.S. 914, 87 S. Ct. 866. The motion picture film is the tangible property which is transferred by the distributor to the exhibitor with the right to use or exhibit the film for an agreed length of time. For the transaction to have value, the transaction necessarily consists of both the right to use and the actual transfer of tangible property, and the entire transaction is the subject of taxation.

We have carefully examined the contentions of appellees, and whether expressly described and disposed of or not, we overrule each and all of the contentions made which may be contrary to the disposition we make of the issues in this appeal.

We reverse the judgment of the trial court, which declared unconstitutional and inapplicable the sales and use tax as applied to the leasing and licensing of motion picture films to motion picture theaters in Texas. We hold that the tax as applied to such transaction is valid and not in contravention of the Constitution.

We render judgment that plaintiffs below in both causes take nothing by their suit.

Trueman E. O'Quinn,
Associate Justice

Reversed and Rendered
Filed: October 5, 1977

C-1

CLERK'S OFFICE – SUPREME COURT

Austin, Texas

May 17, 1978

Dear Sir:

You are hereby notified that ALL Motions for Rehearing in the case of MARTIN THEATRES OF TEXAS, INC. vs. BOB BULLOCK, COMPTROLLER ET AL, B-7202 & B-7203, was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

**IN THE COURT OF CIVIL APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN**

JUDGMENT RENDERED OCTOBER 5, 1977

12,608 — BOB BULLOCK, COMPTROLLER OF PUBLIC
and ACCOUNTS, ET AL. V. ABC INTERSTATE
THEATRES, INC., ET AL. (and)

12,621 — BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL. V. MARTIN THEATRES
OF TEXAS, INC.

APPEAL FROM 126TH DISTRICT COURT OF TRAVIS COUNTY REVERSED AND RENDERED — Opinion by Associate Jusice O'Quinn

THESE CAUSES came on to be heard on the transcripts of the record and same being inspected, because it is the opinion of the Court that there was error in the judgments, IT IS THEREFORE considered, adjudged and ordered that the judgments of the trial court are reversed, and judgment is here rendered that appellees take nothing by their suit. It is FURTHER ordered that appellees pay all costs in this behalf expended both in this Court and the court below and that this decision be certified below for observance.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 78-243

MARTIN THEATRES OF TEXAS, INC.
Petitioner

VS.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, WARREN G. HARDING, STATE TREASURER AND JOHN L. HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Respondents

On Petition For a Writ of Certiorari To the Supreme Court of Texas

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Brief for Respondents in Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 78-243

MARTIN THEATRES OF TEXAS, INC.,
Petitioner

VS.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, WARREN G. HARDING, STATE TREASURER AND JOHN L. HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Respondents

On Petition For a Writ of Certiorari
To the Supreme Court of Texas

Brief for Respondents in Opposition

Respondents, Bob Bullock, Comptroller of Public Accounts, Warren G. Harding, State Treasurer and John L. Hill, Attorney General of the State of Texas, respectfully submit the following brief in opposition to the issuance of a writ of certiorari as prayed for by Petitioner.

QUESTIONS PRESENTED

Petitioner presents two questions:

1. Whether the Texas Limited Sales, Excise and Use Tax Act, Art. 20, Title 122A, Taxation-General, 20A V.T.C.S., violates the equal protection clause of the

Fourteenth Amendment in taxing the leasing of motion picture films by motion picture theatres and others while exempting leasing of motion picture films by television stations.

2. Whether the imposition of the Texas Limited Sales, Excise and Use Tax Act upon Petitioner penalizes Petitioner for successfully challenging the constitutionality of a section of the Texas Admissions Tax Act and violates the equal protection and due process clause of the Fourteenth Amendment.

ARGUMENT

The Fourteenth Amendment to the United States Constitution provides ". . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law."

"[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). "The prohibition of the Equal Protection Clause goes no further than invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). This Court set out the limitation that the Equal Protection clause imposes on the State's power to tax in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937). Taxpayers employed more than eight employees and so were subject to a state occupation tax. In response to the contention that the tax violated the Fourteenth Amendment, the Court wrote:

> It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation . . . This Court has repeatedly held that inequalities

> which result from a singling out of one particular class for taxation or exemption infringe no Constitutional limitation . . . A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it . . . at 509.

It is plain that the Fourteenth Amendment poses only minimal restraints on a state's power to tax, and will not invalidate a classification except in extraordinary situations. The burden is on the person attacking the statute who must negative every conceivable basis which might support the legislative arrangement. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). The legislatures "are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in sone inequality." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

In a recent ad valorem tax case this Court wrote:

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. * * * Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produces reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

Lehnhausen also cited *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959):

> "Of course, the States, in the exercise of thier taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." At 526-527.

Since ad valorem taxes are those taxes most subject to the requirements of equal protection and excise taxes are subjected to much less stringent standards, it would seem that only an extreme exercise of palpably arbitrary discrimination against a class would offend the federal constitution. One writer concluded that "the right of a state to exempt specific items of property or specific transactions from such [sales or use] taxes appears to have few constitutional or legal requirements. Brabson, Analysis of Sales and Use Tax Exemption — with Comment as to More Uniform Application, 9 Vand.L.Rev. 294, 310 (1956). This Court commented that it has "repeatedly held that inequities which result from the singling out of one particular class for taxation exemptions infringe no constitutional limitations." *Independent Warehouse, Inc. v. Scheele*, 331 U.S. 70, 86 (1947).

Testimony was offered at trial which shows that motion picture theatres in addition to exhibiting film, do have concession sales and advertise. Television stations also advertise, but cannot have concession sales since the place of exhibition is the home. However, 99.6% of

theatre revenue, whether from admissions or concessions, is derived from customers who enter to witness the exhibition of the film. Television does not derive any of its revenue from those who watch the films. The Texas Court of Civil Appeals also found that the showing of films is the sole occupation of theatres, but is incidental to a television station's principal business of news medium and exhibition of commercial and other kinds of advertising. Petitioner's Brief, B-8. These are reasonable distinctions on which the Legislature can base a classification for taxation purposes.

The fact that the exemption is based on differences in occupation rather than on differences in the sales transaction or the later use is not unusual. Texas courts as well as courts of sister jurisdictions have upheld sales tax exemptions based on classes of persons as well as exemptions based on transactions. In *American Transfer & Storage Co. v. Bullock*, 525 S.W.2d 918 (Tex. Civ. App. — Austin 1975, writ ref'd), the court upheld the exemption of tax on containers for sellers of goods when containers used by sellers of services were not exempted. New Jersey permitted the taxation of direct mail advertising services while newspaper and magazine advertising was exempted. *Fisher-Stevens, Inc. v. Director, Division of Taxation*, 298 A.2d 77 (N.J. 1972). That advertisers who sold advertising by means of billboards were not exempt from sales tax and those who sold advertising by means of newspapers were exempt was upheld as a reasonable classification by the Supreme Court of Oklahoma. *In Re Assessment of Sales Tax Against Knapp*, 95 P.2d 92 (Okla 1939). Courts have also upheld exemption for classes of persons such as people selling on an isolated basis, landlords renting two unit apartments and farmers. *Morrow V. Henneford*, 47 P.2d 1016 (Wash. 1935); *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950); *Welch v. Sells*, 192 N.E.2d 753 (Ind. 1963). Classification for exemption by occupation as well as item sold

is not unusual in the field of Sales and Use Tax and is a legitimate basis for different tax treatment so long as there are reasonable differences in the occupations.

Petitioner's second argument is specious. Petitioner contends that Article 20.04(Z), Title 122A, Tax.-Gen., 20A V.T.C.S., unconstitutionally penalizes Petitioner for successfully contesting the Texas Admissions Tax Act. Article 20.04(Z), in addition to completely exempting television stations from payment of sales tax on motion picture rentals, also exempted motion picture theatres which were subject to admissions taxes. It is clear that the statute was designed to insure that motion picture theatres would not be inordinately burdened in the total scheme of taxation. The Legislature could have reasonable imposed both taxes on the industry without rendering either tax unconstitutional. Even should the burden be so great as to destroy the commercial or use value of the thing on which it is laid, a tax will not be deemed unconstitutional, *Lehnhausen, supra; Kathleen Citrus Land Co. v. City of Lakeland*, 169 So. 356, 358 (Fla. 1936), unless the party is engaged in performing a public service where the right to regulate has been sustained. *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 91 (1901). "Where the classification is such that the individual has some control over his inclusion or exclusion therefrom, it cannot be considered constitutionally discriminatory." 71 Am.Jur.2d, State and Local Taxation, § 179; *State v. Margay Oil Corp.*, 269 S.W. 63 (Ark. 1925).

Petitioner argues that the "penalty" of increased cost of business as a result of taxation should render the tax unconstitutional. In considering the same argument for a different tax, this court rejected this rationale, reasoning that the burden of taxation is no different from other costs incurred in bringing the product to the consumer when the taxpayer is under no legal obligation to pass

the tax along to the consumer. Presumably, it could be added to the price charged the consumer as are the other costs. *Gurley v. Rhoden*, 421 U.S. 200, 211 (1975).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I hereby depose and say that I am a member of the Bar of the United States Supreme Court and this _____ day of September, 1978, I served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on Petitioner Martin Theatres of Texas, Inc., by depositing the same in the United States Post Office addressed to the Hon. Geo. Garrison Potts, one of its counsel of record, at his post office address, 2300 Republic National Bank Tower, Dallas, Texas, 75201

with Certified, Return Receipt Requested, first class postage prepaid.

_____

MARTHA E. SMILEY

Subscribed and sworn to before me in Austin, Travis County, Texas this _____ day of September, 1978.

_____

Notary Public
Travis County, Texas

My Commission Expires:

_____

APPENDIX

Art. 20.04(Z), Title 122A, Taxation-General, V.T.C.S.

There are exempted from the taxes imposed by this Chapter the receipts from the leasing or licensing of motion picture films of any kind to or by motion picture theatres which are subject to admission taxes as imposed by Chapter 21, Title 122A, Revised Civil Statutes of Texas, 1925, as amended, and to or by licensed television stations.